

Supreme Court, U. S.
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IN THE
Supreme Court of The United States

OCTOBER TERM, 1977

NO. 77-1453

JACK BIRGE,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA**

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Does the Supreme Court of the United States have jurisdiction to review a judgment rendered by the Supreme Court of Georgia which merely construes a state statute and in which the validity of the statute (or an authority exercised under the statute) is not drawn in question on the ground of its being repugnant to the Constitution?

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257. State courts; appeal; certiorari.

Final judgments or degrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

GA. CODE ANN. § 26-3001 (1977 Rev):

It shall be unlawful for: (a) any person in a clandestine manner to intentionally overhear, transmit, or record, or attempt to overhear, transmit, or record the private conversation of another which shall originate in any private place;

* * * *

STATEMENT OF THE CASE

The petitioner, Jack Birge, is a physician in Carrollton, Georgia. He stands convicted of hindering the punishment of a criminal. See Ga. Code Ann. § 26-2503 (1977 Rev.).

The genesis of the petitioner's conviction was the arrest of his son by Carrollton police officers for possession of slightly more than thirty-six pounds of marijuana. At the time he signed his son's bond, Birge was shown the marijuana that had been seized.

The marijuana was seized pursuant to a search warrant and the warrant was maintained in a case file prepared in conjunction with the investigation that resulted in the arrest of the younger Birge. Subsequently, the file could not be located and when a thorough search for the "misplaced" file did not prove productive, theft was suspected.

When the investigation concerning the missing file led to Andrew Dominick, he related that, at the request of the petitioner, he engineered the removal of the file through a Carrollton policeman, Robert Coats. After receiving the file from Coats, Dominick further related that he carried the file to the petitioner where it was burned.

To verify his accusations, Dominick agreed to conceal an electronic transmitting device on his person while he discussed the theft of the file with Coats and Birge. With the

device in place, Dominick met with the petitioner; they discussed burning the file, concealing the theft of the file, and financial reward. ^{1/} The conviction was recorded by law enforcement authorities and the tape was played before the jury.

The recording of the conversation between Dominick and Birge was effected without prior judicial authorization. See Ga. Code Ann. § 26-3004 (1977 Rev.). Birge contended that, absent prior judicial authorization, the transmission and recording of his conversation with Dominick was unlawful because he, Birge, did not also consent to the interception. See Ga. Code Ann. § 26-3001(a) (1977 Rev.); Ga. Code Ann. § 26-3006 (1977 Rev.); Ga. Code Ann. § 26-3007 (1977 Rev.). The State argued that the interception of the Birge-Dominick conversation was not unlawful because Dominick consented to the interception.

The Supreme Court of Georgia of course rejected the petitioner's argument and held that Ga. Code Ann. § 26-3001(a) (1977 Rev.) does not prohibit one party to a conversation from recording or transmitting it without the consent of the other party. State v. Birge, 240 Ga. 501, 241 S.E.2d 213 (1978). The petitioner now seeks certiorari to review that judgment; the thrust of his position is that the Supreme Court of Georgia has "subordinated the [state] statute to the decisional praxis utilized by the Federal

Courts in their determination of the constitutionality of surveillances undertaken pursuant to the Federal Omnibus Bill." Pet. for Cert., p. 11.

^{1/} Mrs. Dominick received a sum of money from the petitioner at his office.

REASON FOR NOT GRANTING THE WRIT

THE PETITIONER ONLY ASSAILS THE CONSTRUCTION OF A STATE STATUTE BY THE SUPREME COURT OF GEORGIA; HE DOES NOT QUESTION THE VALIDITY OF THE STATUTE ON THE GROUND OF ITS BEING REPUGNANT TO THE CONSTITUTION, TREATIES OR LAWS OF THE UNITED STATES.

This Court may, under 28 U.S.C. § 1257(3), review final judgments or decrees rendered by the highest court of a State in which a decision could be had by:

"writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

In order to give the Court jurisdiction to review a judgment which the highest court of a State has rendered in favor of the validity of a statute or of an authority exercised under a State statute, the validity of the statute or authority must have been drawn in question on the ground of its being repugnant to the Constitution, laws, or

treaties of the United States. When no such ground has been presented to or considered by the courts of the State, this Court does not have jurisdiction. Michigan Central R.R. Co. v. Michigan Southern R.R. Co., 60 U.S. 378, (1857).

At issue in the state courts was whether the Georgia statute requires one-party or two-party consent vis-a-vis electronic surveillance. The issue was purely and simply one of statutory construction; no federal constitutional question was present. 2/

Obviously, the Court does not authoritatively construe state legislation. See United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971). As the issue before the Court is clearly the construction of Code Ann. § 26-3001 (1977 Rev.), and not its validity under the Constitution, jurisdiction is lacking. 28 U.S. § 1257(3); Michigan Central R.R. Co. v. Michigan Southern R.R. Co., *supra*; Commercial Bank of Cincinnati v. Buckingham's Executors, 46 U.S. 317 (1847).

2/ The Fourth Amendment argument raised in cases with similar facts has been rejected. *E.g.*, United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966); Lopez v. United States, 373 U.S. 427 (1963).

CONCLUSION

For the above and foregoing reasons, the petition to grant the writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served three copies of the foregoing Brief for the Respondent in Opposition upon Mr. A. Cecil Palmour, Cook & Palmour, Post Office Box 468, Summerville, Georgia, 30747, by depositing same in the United States mail, properly addressed with sufficient postage prepaid.

This ____ day of _____, 1978.

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